Supreme Court, U.S.
FILED
03-517 MAY - 4 2004
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No. 03-

IN THE

Supreme Court of the United States

TIM SCARROT and ANDREW KOPONEN,

Petitioners,

v.

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins; FERNANDO WILKINS, Individually; JOSEFINA WILKINS, Individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an excessive force case involving the fatal shooting of an undercover police officer by two fellow officers, the court of appeals affirmed the denial of summary judgment on the issue of qualified immunity without determining, based on plaintiffs' version of the situation confronting the officers, whether the officers could have had an objectively reasonable belief that the force they used was necessary and lawful.

The questions presented are:

1. On a motion for summary judgment on the issue of qualified immunity in an excessive force case, is a court required to determine, after resolving all factual disputes in the plaintiffs' favor, whether a reasonable officer facing the same circumstances as the defendant officers could have believed that the actions taken by the defendants were lawful?

2. If the foregoing test is applied, are the officers entitled to qualified immunity from civil liability?

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The opinion of the court of appeals (App., *infra*, 1a-13a.) is reported at 350 F.3d 949. The order of the district court (App., *infra*, 14a-15a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 20, 2003, and denied the appellants' petition for rehearing on January 14, 2004. (App., *infra*, 16a-17a) On April 6, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to May 4, 2004. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Respondents brought this Fourth Amendment excessive force action on behalf of themselves and their decedent, Oakland police officer Willie Wilkins, after two other Oakland police officers mistook Wilkins for an armed criminal suspect and shot and killed him. Wilkins was in plain clothes at the time, working an undercover narcotics assignment. Petitioners Timothy Scarrott and Andrew Koponen are the two officers who shot Wilkins. In this petition, Officers Scarrott and Koponen challenge the lower courts' denial of summary judgment on their qualified immunity defense.

A. Statement of Facts

Most of the facts surrounding the shooting are not in dispute.[1] On January 11, 2001, Officers Scarrott and Koponen were in uniform on regular patrol in Oakland. A.E. 57:25-26; 111:26-112:1. At about 11:00 p.m., they answered a call to assist other officers in the pursuit of a car thief suspect about two miles away. A.E. 58:11-18; 112:6-12. The police dispatcher directed Scarrott and Koponen to a street intersection from which they were to help establish a "perimeter" by observing the area and preventing the escape of the suspect. A.E. 58:19-21, 58:27-28; 112:19.

As Scarrott and Koponen arrived at their assigned position, they saw two men who appeared to be coming out

1. Because this case arises on petitioners' motion for summary judgment, we present all disputed facts in the light most favorable to respondent. References to the record are from the Appellants' Excerpt of Record on Appeal ("A.E.")

of a driveway a half block away. A.E. 59:3-7. The two men were involved in an altercation. A.E. 59:5-11, 112:28-113:5. Neither man matched any of the varying descriptions of the suspect that had been given over the radio by the police dispatcher, A.E. 130:22-23, 131:6-7, 132:4-6, and neither Scarrott nor Koponen thought the two men were connected with the car theft incident. A.E. 58:10-11, 113:6-7. In fact, the two men were Officer Wilkins (in plain clothes) and Demetrius Phillips, the car theft suspect.

Officers Scarrott and Koponen brought their patrol car to a stop directly opposite the sidewalk where the two men were facing each other and got out to investigate. A.E. 112:27-28. Wilkins's back was to Scarrott and Koponen, and Phillips was facing the two officers, as the officers got out of their patrol car. A.E. 60:14; 157:17-18, 304.

What happened next transpired in a matter of only a few seconds. As Scarrott and Koponen were getting out of their patrol car, they both saw Wilkins kick Phillips forcefully in the lower stomach or groin, and they saw Phillips fall to the ground in reaction to the kick. A.E. 59:12-13; 72:12-21; 113:1-5. Wilkins then pulled a non-police-issue handgun from his waistband and leveled it at Phillips's head from about one foot away. A.E. 59:16-17; 73:6-7, 113:11-13; 128:2-4. Upon seeing this, Officer Koponen yelled, "he's got a gun!" A.E. 59:16-17, 80:8-9, 113:14-15. Wilkins immediately pulled back the hood of his sweatshirt, glanced over his shoulder at Officers Koponen and Scarrott and said in a loud voice: "It's me, Willie," and then he looked back toward Phillips, all the while keeping his gun trained on Phillips's head. A.E. 82:8-14, 83:16-26.

Neither Scarrott nor Koponen knew Officer Wilkins, and neither had ever seen him before that evening. A.E. 60:14-18, 113:21-27) Neither suspected that the man with the gun might be an undercover police officer. A.E. 60:9-10, 60:15.[2] In fact, Phillips himself, who had been interacting with Wilkins for as much as a minute prior to Scarrott and Koponen's arrival, had no idea that the man pointing the gun at him was a police officer. A.E. 81:14-17; 109. Phillips thought Wilkins might be the owner of the truck he had stolen earlier that night. *Id.* Although both Scarrott and Koponen saw Wilkins glance back over his shoulder at them, neither of them heard him say anything. A.E. 59:22-24; 74:5-75:5. Both officers believed Wilkins was about to shoot Phillips, and Phillips himself believed he was about to be executed. A.E. 59:25-60:7; 113:14-17; 75:104; 106-108.

Officers Scarrott and Koponen both opened fire simultaneously, expending thirteen or fourteen rounds at Wilkins and hitting him nine times. App., *infra*, 7a. As they fired, both Scarrott and Koponen were convinced that shooting Wilkins was the only way for them to keep him from murdering Phillips. A.E. 60:5-7, 113:14-24. Immediately after Phillips fell to the ground, Officer McClure, another officer at the scene (who had in fact known Wilkins for several years but did not recognize him initially), approached Wilkins and handcuffed him, treating him as a criminal suspect. A.E. 168:19-22, 169:19-23.

2. Neither Scarrott nor Koponen were aware of the presence of any undercover officers in the area. A.E. 232, 240, 266. Although Wilkins had made several broadcasts on the radio channel that Scarrott and Koponen were monitoring, Wilkins had never identified himself, given his location, or said anything to indicate to other officers that he was in plain clothes. A.E. 127:21-26, 132:5.

Only one other police officer, Torrey Nash, was at the scene.[3] Officer Nash was a long time friend of Wilkins. A.E. 299. Nash had spoken with Wiklins for about fifteen minutes just a few hours before the incident, and Nash immediately recognized Wilkins by the clothes he was wearing. A.E. 304. Nash apparently did *not* see Wilkins kick Phillips. *See* A.E. 514:14 - 515:10. Nash *does* recall hearing someone (presumably either Scarrott or Koponen, and possibly both) yelling, "He has a gun!" *Id.* He also recalled someone yelling "Police!" and "Get your hands up!" A.E. 304, 305. Nash also recalls saying at some point either "It's Willie" or "It's a cop" just before Scarrott and Koponen opened fire, but he uttered these words "without speaking to anyone in particular." A.E. 156:25-27. It is undisputed that in fact neither Scarrott nor Koponen heard him. A.E. 60:16-17; 113:21-24.[4]

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3. The court of appeals repeatedly refers to "the other police *officers* [plural] at the scene" who either "described . . . the scene as consistent with police procedure for high risk arrests" or who "[were *not*] operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun." App., *infra*, 7a, 10a. The lower court's use of the plural in these references is mistaken because there were only five officers at the scene – Scarrott, Koponen, Wilkins, McClure and Nash – and only Nash testified that he recognized Wilkins to be a police officer attempting an arrest.

4. At his deposition, Officer Nash expressed the opinion that a reasonable police officer should have known that Officer Wilkins was a fellow officer making an arrest based on the manner in which Wilkins approached Phillips. A.E. 308. However, Nash refused to opine that it was impossible for Scarrott or Koponen to have mistaken Wilkins for a civilian. *Id.*

B. Statement of the Case

Officers Scarrott and Koponen moved for summary judgment based in part on qualified immunity. A.E. 26. The district court denied the motion, stating:

> . . . Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:
>
> > a. Triable issues of material fact exist which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.
> >
> > b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

App, *infra*, 15a. The district court's order did not specify which material facts were in dispute or what evidence it found raised triable issues as to those facts.

The Ninth Circuit affirmed. The court began by noting that under *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), its jurisdiction was limited to whether Officers Scarrott and Koponen are entitled to qualified immunity. App., *infra*, 2a-4a. The court began its

qualified immunity analysis by acknowledging that it was bound to apply the two-step analysis set forth in *Saucier v. Katz*. App. 9a.

Under *Saucier*, the "initial inquiry," or "threshold question," is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201, 121 S. Ct. at 2156. If not, the lawsuit terminates and qualified immunity has no job to do. *Id.* If so, however, "the next, sequential step is to ask whether the right is clearly established" – an inquiry which "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* At this stage, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Id.* at 202, 121 S. Ct. at 2156.

The Court of Appeal (citing *Saucier*) described the second step as "an inquiry into the reasonableness of the officer's belief in the legality of his actions," App., *infra*, 10a, and then proceeded to dispense entirely with that inquiry:

> For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to resolve this case.

App., *infra*, 10a. The court reached this result by concluding:

> [T]here is no question whether the officers actions in this case violated clearly established law. They did.

App., *infra*, 11a-12a. The court then returned to step one, where it addressed what it considered to be "[t]he only question for resolution[:] . . . whether [the officers'] belief in the necessity of their actions was objectively reasonable." However, instead of undertaking the inquiry "in light of the specific context of the case," which would have entailed examining the record to ascertain whether, viewing the disputed facts most favorably to the plaintiffs, Scarrott and Koponen's mistake was one that a reasonably prudent officer confronted with the same circumstances could have made, the court simply concluded that "the answer to that question depends on disputed issues of material fact [and therefore] is not a legal inquiry, but rather a question of fact best resolved by a jury." App. 12a. Like the district court, the court of appeal did not specify what those factual issues are, but it nevertheless asserted that they were "hotly disputed" and "likely to prove dispositive" at trial. *Id.*

REASONS FOR GRANTING THE PETITION

While purporting to follow this Court's precedent, the various courts of appeal have developed two divergent approaches to the issue of qualified immunity. The decision from which this petition arises represents one such approach. Because this decision undermines the purposes of the immunity as expressed by this Court, petitioners respectfully request that the Court grant this petition.

1. For more than a quarter century this Court has recognized the doctrine of qualified immunity to promote the vigorous exercise of official authority by protecting public officials against liability when they exercise their discretionary authority in a reasonable manner, even if in hindsight they turn out to have been mistaken.

Butz v. Economou, 438 U.S. 478, 506-508, 98 S. Ct. 2894, 2910-2912, 57 L. Ed. 2d 895 (1978); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). The protection afforded by qualified immunity is strengthened by this Court's insistence that, because it provides immunity from suit instead of a mere defense to liability, issues relating to qualified immunity must be resolved "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*per curiam*), [the immunity is "effectively lost if a case is erroneously permitted to go to trial."]; *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). Indeed, this Court adopted a standard of "objective reasonableness" with the explicit goal of encouraging courts to grant summary judgment in appropriate cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

Under this Court's standard, immunity attaches unless no competent officer could have reasonably believed that the conduct was lawful. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) ["Defendants will not be immune if, on an objective basis, it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." (Emphasis added.)]; *see also Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987) ["the objective (albeit fact-specific) question [is] whether a reasonable officer could have believed [the defendant's actions] to be lawful, in light of clearly established law and the information the [defendant] possessed"]. Thus, the test for qualified immunity does *not* require the defendant officer to prove that his or her conduct

was reasonable, but rather to demonstrate that a competent public official confronted with the same situation *could have believed* it to be reasonable.

In *Saucier v. Katz*, the Court applied these principles to clarify the test for qualified immunity in the context of a summary judgment motion brought in an excessive force case. *Saucier* requires a two-step analysis. In the threshold first step, the court must ascertain whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201, 121 S. Ct. at 2156. If so, "the next, sequential step is to ask whether the right was clearly established" – an inquiry that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* For purposes of this second step, and consistent with the principle articulated in *Anderson* and *Malley*, "the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Id.* at 202, 121 S. Ct. at 2156. The *Saucier* Court went on to admonish that "to deny summary judgment any time a material issue of fact remains on the excessive force claim [] could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Ibid.*

Since *Saucier*, a majority of the courts of appeals have followed this admonition by applying a straightforward analytical approach to determining whether qualified immunity applies in excessive force cases. Under this approach, the courts assume that all controverted material facts have been resolved in favor of the plaintiff and then ask whether a competent officer confronted by the situation

so presented *could have reasonably believed* that the level of force used was legal. If the answer is "yes" – even though other reasonable officers might have concluded otherwise – immunity attaches. In other words, if competent officers, based on plaintiff's version of the facts, could differ on the question of reasonableness, a court must enter summary judgment granting immunity to the officer.

The Ninth Circuit, however, has charted a different and analytically flawed course. Joined by at least some panels of the courts of appeals in the Third, Eighth and Tenth Circuits,[5] the Ninth Circuit has incorrectly read *Saucier* as requiring the denial of summary judgment whenever factual disputes bearing on reasonableness exist. That is, instead of asking the correct question – could a competent officer, based on plaintiff's version of the facts, have reasonably believed the level of force was lawful – the Ninth Circuit would deny summary judgment unless the court is able to decide, as a matter of law, that the officer's conduct was reasonable.

The analysis employed by the Ninth Circuit assures that most claims arising under the Fourth Amendment, will proceed to trial in defiance of the clear contrary direction of this Court. The instant case is a striking example of the negative impact of this error. As explained below, had the Ninth Circuit employed the correct test, petitioners, who were called upon to make a life and death decision in a matter of seconds, would have been entitled to immunity, since there is no doubt, based on plaintiffs' version of the facts, that a competent officer reasonably could have believed that force used was necessary and lawful, even though other competent offers might have disagreed.

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5. *See* section 3 *infra*.

Because of the importance to the day to day work of the federal judiciary in having courts apply the proper standard in determining entitlement to qualified immunity before trial,[6] this court should grant the petition and bring uniformity of decision to this vital area of the law.

2. Although the court below correctly recognizes that *Saucier* requires a two step analysis where qualified immunity is claimed, the court did not undertake the analysis in accordance with *Saucier* and other pertinent decisions of this Court. In this section, petitioners describe the error of the Ninth Circuit's reasoning and its potential for substantially limiting the intended scope of qualified immunity.

According the Ninth Circuit, "the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard." (Emphasis original; citations omitted.) App., *infra*, 9a.

> [The second] step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions. *Saucier*, 533 U.S. at 206. Even if his actions did not violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in a grant of qualified immunity.

[Emphasis original.] App., *infra*, 10a. Having stated these general propositions, the court declares that it need not "reach

6. The issues raised by this appeal are a recurring ingredient of the day-to-day work of the federal court system. For instance, between the first of this year and April 26, 2004, 59 cases were published in the Westlaw system from all Courts of Appeals which cited both "qualified immunity" and this Court's decision in *Saucier*. Every Court of Appeals is represented among those 59 cases.

the second step of the qualified immunity analysis to decide this case." *Id.* Instead, the court finds that "the officers' entitlement to summary judgment is determined solely by application of the first stage. . . ." App., *infra*, 11a.

The court's reasoning in support of this conclusion, while not entirely clear, appears to begin by noting that because the petitioners were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun, "this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable." App., *infra*, 10a. The court then goes on to hold that because it is clearly established that the Fourth Amendment bars the use of deadly force against an officer effecting an arrest, petitioners "could not have been reasonably mistaken as to the legality of their actions had they realized that Officer Wilkins was a police officer." App., *infra*, 11a. "The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances." *Id.* According to the court, this question is resolved in first step of the qualified immunity analysis, and consequently step two does not need to be reached. Having created this analytic framework, the court then found that the first step cannot be resolved on summary judgment because the question of the reasonableness of petitioners' belief with regard to Officer Wilkins' status "depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by the jury." [Citations omitted]. App., *infra*, 12a.

The core error in the Ninth Circuit's approach is the failure, as required by numerous decisions of this Court,

to determine whether, taking the facts in the light most favorable to the plaintiff, a competent officer in the situation petitioners confronted reasonably could have believed the level of force used was lawful. This determination can and should be made on summary judgment since the court is applying the applicable legal standard to plaintiffs' version of the facts. In this posture, no factual issues need to be resolved; the inquiry – contrary to the Ninth's Circuit's holding – is a purely legal one. If the court finds, as a matter of law, that a competent officer could have found the force used reasonable, even if other competent officers might have disagreed, then immunity attaches. *Malley v. Briggs, supra*; *Anderson v. Creighton*, *supra*. A trial to resolve factual disputes is needed only if, on plaintiff's version, no competent officer could have concluded the level of force used was reasonable.

The decision below inverts this test; under the Ninth Court's reasoning, if a court finds that a reasonable officer could disagree with the defendants, then the immunity vanishes at the summary judgment stage. Under this standard, an officer is never entitled to summary judgment on a claim of qualified immunity unless he or she can demonstrate, on the plaintiff's version of the facts, that the use of force was, as a matter of law, reasonable.

The Ninth Circuit's error arises out of its misreading of *Saucier* that the second stage of qualified immunity analysis is limited to measuring the clarity of the legal standard. The Ninth Circuit relied on language in *Saucier* that "the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." 533 U.S. at 284. However, this language does not limit a court's work to surveying

the law. "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Id.* at 285. *Saucier* held that ruling in *Anderson v. Creighton* is fully applicable to excessive force cases. *Id.* at 283. In *Anderson*, this Court found that officers who mistakenly concluded they had probable cause for a warrantless search could be entitled to qualified immunity even though the standard for such searches was "firmly established." 107 U.S. at 640. After *Anderson*, courts weighing the objective reasonableness of official conduct may consider whether the officers have correctly applied the legal standard to the facts which they confronted:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 644.[7]

As a result of its failure to look beyond the clarity of the legal standard, the Ninth Circuit never performed the analysis

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7. Similarly, in *Saucier* the Court rejected the notion that *Anderson* should not apply to excessive force because the standard under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), provides "ample guidance for particular situations." 533 U.S. at 283. This fact, the Court found, did not justify a more limited role for qualified immunity in excessive force cases. *Id.*

required by *Saucier*. In cases challenging an officer's use of force, the second stage of qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" *Saucier*, 533 U.S. at 284, *quoting Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000). The immunity will therefore protect officers unless "application of the excessive force standard would inevitably lead every reasonable officer in the Defendants' position to conclude the force was unlawful." *Priester v. Rivera Beach*, *supra* [internal quotations and citations omitted]. The correct application of this rule requires that, in order to defeat summary judgment, plaintiff must demonstrate that pre existing law "truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Id.*

As this Court recognized in *Anderson v. Creighton*, *supra*, 483 U.S. at 641, a court must undertake a "fact-specific" inquiry in order to resolve "whether a reasonable officer could have believed [the defendant's conduct] to be lawful." Since "disputed facts will exist in virtually every confrontation between citizens and law enforcement officers . . ." *Elliott v. Leavitt*, 105 F.3d 174, 176 (4th Cir. 1997), the Ninth Circuit's formulation of the qualified immunity question assures that summary judgment will be denied in the routine Fourth Amendment case.[8]

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8. As the court in *Winfield v. Bass*, 106 F.3d 525, 535 (4th Cir. 1997), observed:

> Whether the abstract legal right asserted by the plaintiff is "clearly established" will rarely be the controversy in

(Cont'd)

This result defeats a core purpose of this Court's work in the area of qualified immunity. "We repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, *supra*, 502 U.S. at 227, *citing, Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984); *Mitchell*, *supra*, 472 U.S. at 526; *Malley v. Briggs*, *supra*, 475 U.S. at 341; *Anderson*, *supra*, 483 U.S. at 646, n.6.

3. Courts of Appeal have adopted different standards for determining whether officials are entitled to qualified immunity. Some employ the same incorrect analysis as the Ninth Circuit, while others employ a standard consistent with this Court's precedent. As a result, public officials receive markedly divergent results on their claims to immunity.

A number of courts of appeal have given the same restricted treatment to qualified immunity as the Ninth. In a decision filed just last week, the Third Circuit affirmed the denial of summary judgment to paramedics and police officers based on qualified immunity because of factual disputes regarding the reasonableness of defendants' actions. *Rivas v. City of Passaic*, __ F.3d __, 2004 WL 877645 (3rd Cir. 2004). Like the Ninth Circuit, the *Rivas* decision limited its analysis of qualified immunity to whether the legal standard was clearly established. It found that "as a general proposition," that the paramedics "may not abandon a private citizen in a dangerous situation, provided that the state actors are aware of the risk of serious harm and are partly

(Cont'd)

> a denial of a qualified immunity defense. The primary issue will almost always be whether the given facts demonstrate that the right in question has been violated.

responsible for creating the opportunity for that harm to happen." *Id.* at 16. Because the law was sufficiently clear to put defendants "on notice that their conduct, if deemed unlawful, would not shield them with immunity." *Id.* In other words, the Third Circuit, like the Ninth, equated the standard for qualified immunity with standard for liability on the merits of the constitutional claim. The *Rivas* court reasoned that if defendant's conduct was unlawful, then defendants would be deprived qualified immunity because the governing standard was clear, albeit only as a "general proposition." The Third Circuit applied the same reasoning to the police officer defendants. Because the facts relevant to the excessive force claim were disputed, the court concluded the qualified immunity issue could not be resolved on summary judgment. *Id.* In fact, the police officer defendants were charged with utilizing excessive force while restraining a man who was undergoing a seizure. They contended that the man bit them and appeared to be reaching for their gun. However the *Rivas* court found that the defendants' claim that they "reasonably perceived the facts to be different from those alleged by the plaintiff" could only be considered at trial. *Id.* at 14. As a result, the Third Circuit never considered whether a reasonable officer could have perceived the threat in the same way the defendants did. Similarly, in *Kopec v. Tate*, 361 F.3d 772 (3rd Cir. 2004), the Third Circuit, like the Ninth, inverted the qualified immunity standard and denied summary judgment where there was *any* dispute as to the reasonableness of the officer's actions. Instead of granting summary judgment where the defendant's actions were arguably reasonable, the Third Circuit required the defendant to demonstrate that "as a matter of law . . . a reasonable officer would not have known that [his or her] conduct was in violation of the Fourth Amendment . . ." *Id.* at 777.

Following a path similar to that of the Ninth Circuit, the Tenth Circuit in *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (10th Cir. 2002), found that excessive force standard under *Graham v. Connor* is "clearly established for the purposes of § 1983 actions." As a result, the *Olsen* court found qualified immunity an inappropriate subject for summary judgment. "Because the reasonableness inquiry overlaps with the qualified immunity analysis, 'a qualified immunity defense [is] of less value when raised in defense of an excessive force claim.'" *quoting Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001). Because the question whether an officer acted reasonably in using deadly force is "heavily fact dependent," the *Olsen* court concluded that, "this court will not approve summary judgment in excessive force cases—based on qualified immunity or otherwise—if the moving party has not quieted all disputed issues of material fact." 312 F.3d at 1314; citing *Allen v. Muskogee*, 119 F.3d 837, 840-842 (10th Cir. 1997). Utilizing the same analysis as the Ninth Circuit, the Tenth Circuit thus announces a rule that will generally preclude resolving excessive force cases by summary judgment on qualified immunity grounds.

In *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002), the Eight Circuit denied summary judgment to two officers who had employed deadly force against a suspect they believed to be armed. Because of "internal discrepancies and variations in the officers' testimony," the court denied summary judgment on the grounds that, "the current record does not conclusively establish the reasonableness of the officers' actions or beliefs." By requiring the officers to "conclusively establish" the reasonableness of their actions, the Eighth Circuit, like the Ninth, never considered whether a reasonable officer *could have* thought the defendants' actions lawful.

In contrast, other Circuits employ an analysis which conforms to this Court's view of qualified immunity. For instance, the Eleventh Circuit applies a standard of "arguable probable cause" to qualified immunity rather than the "higher standard of actual probable cause." *Jones v. Cannon*, 174 F.3d 1271, 1283, n.3 (11th Cir. 1999). Under this test, "an officer will be entitled to qualified immunity if he had 'arguable probable cause' to employ deadly force; in essence, we decide whether 'the officer reasonably could have believed that probable cause existed' to use deadly force." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003), *quoting Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997). *See also Provost v. City of Newburgh*, 262 F.3d 146, 169 (2d Cir. 2001) ["In an unlawful arrest action, an officer is immune if he has arguable probable cause, and is subject to suit only if his judgment was so flawed that no reasonable officer would have made a similar choice." [internal quotations and citations omitted.]]; *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998) ["Arguable probable cause exists when 'a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law.'"], *quoting Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997).

Other courts of appeal, while not using the "arguable probable cause" terminology use a similar analysis. These courts ask whether a reasonable officer *could have* believed the challenged action to be lawful. For instance, in *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-1376 (1st Cir. 1995), *cert. den. sub nom., Hegarty v. Wright*, 516 U.S. 1029, 116 S. Ct. 675, 133 L. Ed. 2d 524 (1995) the court held:

> We must isolate all reasonably reliable information collectively known to the officers at the time their

> challenged conduct occurred, *without indulging hindsight*, to determine whether an "objectively reasonable officer" with the identical information, *could* have concluded that there were exigent circumstances sufficient to support an immediate forcible entry of the Hegarty cabin to effect Katherine's warrantless arrest.

[internal quotations and citations omitted, emphasis in original]]; *see also Lennon v. Miller*, 66 F.3d 416, 421 (C.A.2 (N.Y.), 1995) ["Thus, if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate."]; *Gomez v. Atkins*, 296 F.3d 253, 261-2 (4th Cir. 2002) ["In our assessment of whether Atkins is entitled to qualified immunity, however, the question is not whether there actually was probable cause for the murder warrant against Isidro, but whether an objective law officer could reasonably have believed probable cause to exist."]; *Estep v. Dallas County*, 310 F.3d 353, 361 (5th Cir. 2002) ["In our view, the constitutional violation in this case is clear-cut and obvious. No reasonable police officer could have really believed that a search was constitutional under the circumstances presented."]; *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) [summary judgment on qualified immunity appropriate "when the undisputed material facts, on the plaintiff's version of disputed material facts, demonstrate that a hypothetical reasonable officer would not have known that his actions, under the circumstances, were objectively unreasonable."]; *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003) ["If the facts as alleged by Payne are found to be true, then and only then, should it have been clear to Officer Pauley, or to any reasonable officer under these circumstances, that it would be unlawful to use the amount of force he did to arrest Payne."]

The test which the court employs will, in many cases, determine the outcome of the officer's right to immunity.[9] When courts correctly apply the standard of objective reasonableness, officers will be entitled to qualified immunity even when there is a dispute as to whether the officers violated the Fourth Amendment. For instance, in *Hegarty v. Somerset County, supra,* 53 F.3d 1367, 1377, the court found the officer immune, even though the officer's choice of strategy was questioned:

> we do not determine which of these strategies represented the *more* prudent course or posed the *least* serious risk to the suspect, the officers or others in the vicinity. Rather, we consider only whether a competent police officer in these circumstances reasonably could have opted for an unannounced approach to the cabin walls forthwith.

See also Anderson v. Russell, 247 F.3d 125, 131 (4th Cir. 2001) [officers immune for use of force despite dispute as to reasonableness of conduct]; *Altman v. City of High Point*, 330 F.3d 194, 206-206 (4th Cir. 2003) [same]; *Mace v. City of Palestine*, 333 F.3d 621, 624-5 (5th Cir. 2003) [Regarding use of deadly force: "[a]lthough, in retrospect, there may have been alternative courses of action for Henderson to take, we

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9. Of course, in some cases, the officer will not be entitled to qualified immunity because, under the version of the facts most favorable to the plaintiff, no reasonable officer could believe that the conduct alleged by the plaintiff was constitutional. *See, e.g., Estep v. Dallas County, supra*; *Payne v. Pauley, supra.* However, there are a significant number of cases where the reasonableness of a defendant's conduct is subject to debate, and therefore, qualified immunity should attach.

will not 'use the 20-20 vision of hindsight' to judge the reasonableness of Henderson's use of force."]; *Scott v. Edinburg*, 346 F.3d 752, 759-760 (7th Cir. 2003) [Officer entitled to immunity for use of deadly force to protect bystanders despite conflicting evidence from eyewitnesses]; *Carr v. Tatangelo*, 338 F.3d 1259, 1269, n.20 (11th Cir. 2003) [Immunity for use of deadly force proper despite plaintiff having "stated a cognizable Fourth Amendment seizure claim."]; *Willingham v. Loughnan*, 321 F.3d 1299, 1304 (11th Cir. 2003); *Vaughan v. Cox*, *supra*, 316 F.3d at 1213-4 [defendant entitled to qualified immunity for use of deadly force despite fact that "a reasonable jury, under Vaughan's version of the events, could find that Deputy Cox's conduct violated the Fourth Amendment."] Had the courts in these cases applied the test defined by the Ninth Circuit, they would have concluded that summary judgment was improper.

4. If the analysis required by this Court had been employed, the courts below would have concluded that petitioners were entitled to qualified immunity.

There is no question that if it were true that Wilkins was about to shoot Phillips, petitioners were entitled to use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). Because a warning was not feasible, the Fourth Amendment did not require petitioners to give one before taking action. *Krueger v. Fuhr*, 991 F.2d 435, 440 (8th Cir 1993), *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 335, 114 S. Ct. 386 (1993) ["However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable."] Moreover, although petitioners never thought

that Wilkins was a police officer before firing their weapons, petitioners had a duty to prevent him from carrying out what appeared to them to be an unjustified use of deadly force regardless of his status. Officers are required to intervene to prevent the violation of civil rights by another law enforcement officer or face civil liability themselves. *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) ["[I]f a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable[.]"] Nor do respondents contend that petitioners were acting from an improper motive or outside their role as law enforcement officers.[10]

The petitioners' right to qualified immunity therefore presents a straightforward question: *could* a reasonable officer facing the circumstances the petitioners faced conclude that immediate force was necessary to protect the life of Demetrius Phillips? Although the Ninth Circuit undertook no analysis, none of the facts cited in the decision below support the conclusion that the petitioners' decision was an unreasonable one. The fact that Officer Wilkins said, "it's me, Willie" would not have informed petitioners that Wilkins was a police officers, even if the petitioners had been

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10. Respondents conceded that the decisions in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365 (9th Cir. 1998) mandated the conclusion that petitioners were entitled to judgment on petitioner's motion for summary judgment on substantive due process. A.E. 200. Respondents thus acknowledged that there are no facts that would support a conclusion that petitioners acted with an intent to harm unrelated to a legitimate law enforcement purpose. *County of Sacramento*, 523 U.S. at 836; *Moreland*, 159 F.3d at 372-3.

able to hear the statement. Wilkins' failure to clearly identify himself and his true motives had a tragic outcome but it is only with the benefit of hindsight that petitioners can possibly be faulted for drawing the conclusion they did. Nor is the fact that another police officer at the scene, Officer Nash, recognized Officer Wilkins even relevant. Unlike the petitioners, Officer Nash knew Officer Wilkins and had spoken to him a few hours earlier. Similarly, Officer Nash's opinion that Wilkins approached Phillips in a manner consistent with a police officer making an arrest is only marginally relevant at best. At most, his opinion shows only that an officer could disagree with petitioners. Important in this regard, Officer Nash did *not* observe Wilkins kicking a nonthreatening suspect actions which are contrary to standard patrol police practice and which led the petitioners to the opposite conclusion from Officer Nash. A.E. 16:17-24. Viewing the entire record[11] from "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham v. Connor, supra,* 490 U.S. at 396, the scene which unfolded before petitioners demanded instantaneous, decisive action. As this Court has observed,

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11. Stating that "the key issue in this case is not whether the 'undisputed facts establish that the actions of the officers were objectively reasonable and not a violation of Wilkins' constitutional right,'" the court below took the position that "it is the *disputed* facts that are crucial" for the qualified immunity analysis [cite]. If it is the Ninth Circuit's position that a court should consider less than the entire record, then it has committed another error. *Kuha v. City of Minnetonka*, 328 F. 3d 427, 438 (8th Cir. 2002) ["We are mindful that we must construe the facts in the light most favorable to Kuha and we do so. But we cannot ignore the undisputed facts that are equally relevant to our analysis."]; *see also Winfield v. Bass*, 106 F.3d 525, 534-5 (4th Cir. 1996) [In addition to facts supporting decision denying qualified immunity, "we should not ignore other, undisputed, facts in rendering our decision . . ."]

police officers "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer v. Rhodes*, 416 U.S. 232, 246, 94 S. Ct. 1683, 1691, 40 L. Ed. 2d 90 (1974); *see also Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) ["The Fourth Amendment does not require officers to wait until a suspect shoots to confirm that a serious threat of harm exists."]

Several other factors make qualified immunity appropriate in the circumstances facing the petitioners. Both officers independently concluded that they should fire their weapons. Neither they nor Mr. Phillips believed Wilkins to be a police officer and all three believed that Wilkins intended to shoot Phillips. The petitioners were required to make an instantaneous decision based only on what they were able to perceive in the moment. Finally, the petitioners believed that Mr. Phillips had only seconds to live. It appeared to the petitioners that further delay and contemplation of alternatives would only result in Phillips' death. It can hardly be said that the petitioners actions "truly compel" the conclusion for every like-situated reasonable officer that petitioners' actions violated the constitution. *Priester v. City of Rivera Beach, supra.*

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARGUED AND SUBMITTED NOVEMBER 20, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15086

D.C. No.
CV-01-01402-MMC

Kely Wilkins, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; William Alberto Wilkins, Individually; The Estate of William Wilkins; William Randolph Wilkins, a minor, by and through his Guardian Ad Litem, Kely Wilkins; Fernando Wilkins, Individually; Josefina Wilkins, Individually,

Plaintiffs-Appellees,

v.

CITY OF OAKLAND,

Defendant,

v.

Tim Scarrott, individually, and in his official capacity as a Police Officer for the City of Oakland; Andrew Koponen, individually, and in his official capacity as a Police Officer for the City of Oakland,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
October 6, 2003—San Francisco, California

Filed November 20, 2003

Before: Procter Hug, Jr., Betty B. Fletcher, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge B. Fletcher

OPINION

B. FLETCHER, Circuit Judge:

Defendants-Appellants Tim Scarrott and Andrew Koponen, Police Officers for the City of Oakland ("Scarrott and Koponen," or "the officers"), raise several issues on appeal. We conclude that we have jurisdiction to consider only the district court's denial of their motion for summary judgment on the ground of qualified immunity. We affirm.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1291 over an interlocutory appeal where the ground for the motion in question is qualified immunity. *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (per curiam); *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000). In such circumstances,

however, appellate review is generally limited to issues of law, *see Johnson v. Jones*, 515 U.S. 304 (1995), and "does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact." *Jeffers*, 267 F.3d at 903; *see Behrens v. Pelletier*, 516 U.S. 299, 306 (1996).

The first question to be resolved, therefore, is whether this court has jurisdiction over all the issues raised on appeal. In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that a district court's rejection of a claim of qualified immunity, "to the extent that it turns on an issue of law," is a final decision subject to immediate appeal under 28 U.S.C. § 1291. Nevertheless, we are not precluded from hearing this interlocutory appeal merely because there are issues of fact in dispute. *See Jeffers*, 267 F.3d at 903; *Schwenk*, 204 F.3d at 1195; *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). Where disputed facts exist, we will determine if the denial of qualified immunity was proper by assuming that the version of events offered by the non-moving party is correct.

It is well-established that "an appellate court lacks jurisdiction over an interlocutory appeal challenging the sufficiency of the evidence supporting the trial court's conclusion that an issue of fact exists." *Jeffers*, 267 F.3d at 903, citing *Johnson*, 515 U.S. at 313. The opinion in *Jeffers* explained that "any issue of law, including the *materiality* of the disputed issues of fact, is a permissible subject for appellate review." 267 F.3d at 905 (emphasis added). Thus this court has jurisdiction to consider whether, even

accepting the Wilkinses'[1] version of the events on January 11, 2001, the alleged conduct of the officers violated a clearly established legal standard. *See Knox*, 124 F.3d at 1107 (distinguishing *Johnson*, where the defendant simply denied having committed the alleged acts, from the situation where the motion presents only the legal question of whether the alleged conduct violated a clearly established right).

The officers raise three issues in their appeal of the denial of qualified immunity, arguing that: (1) they did not violate the decedent Wilkins' Fourth Amendment right; (2) the trial court did not identify facts which would support such a finding; and (3) even if there were a triable issue of fact on the alleged Fourth Amendment violation, the officers are entitled to qualified immunity. We have no jurisdiction over the first two issues in this interlocutory appeal, because they focus on the merits of the Wilkinses' claim, not the materiality of disputed facts, nor the legal issues relevant to qualified immunity. On an interlocutory appeal of a denial of qualified immunity, this court does not have jurisdiction to rule on the merits of the Wilkinses' Fourth Amendment claim, nor may it conduct an inquiry into the sufficiency of evidence to support a finding that the officers did in fact violate Wilkins' constitutional right. Contrary to the arguments of the officers in their brief, the key issue in this case is not whether the "undisputed facts establish that the actions of the officers were objectively reasonable and not a violation of Wilkins'

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1. Appellees are the decedent Wilkins' estate, his parents, his widow and child (hereinafter "the Wilkinses"). References to "the Wilkinses" are therefore to the parties who are the appellees in this case; references to "Wilkins" are to the decedent whose Fourth Amendment right was allegedly violated by the officers.

constitutional right." As we explain below, in this case it is the *disputed* facts that are crucial for both the qualified immunity analysis and the eventual disposition of the Wilkinses' claim on the merits. The issue for decision is thus whether the officers are eligible for qualified immunity under the Wilkinses' version of the disputed facts.

Resolving all factual disputes in the Wilkinses' favor, therefore, we may consider only whether Scarrott and Koponen are entitled to qualified immunity from the Wilkinses' § 1983 claim.

FACTUAL AND PROCEDURAL BACKGROUND

The parties recount different versions of the events that took place on the night of January 11, 2001. Although some of the relevant facts are undisputed, others that are important to the merits of the Wilkinses' claim remain contested. In reviewing the district court's denial of summary judgment on the ground of qualified immunity, this court must "assume that the version of the facts asserted by the non-moving party is correct in determining whether the denial of qualified immunity was appropriate." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 (9th Cir. 2003); *see also Schwenk*, 204 F.3d at 1193, n.3.

The following facts are not in dispute. On January 11, 2001, Officer William Wilkins was assigned to work in plain clothes in the narcotics unit of the Oakland Police Department. At approximately 11:00 p.m., Officer Wilkins and other police officers were pursuing a stolen white Jeep near 90th Avenue and B Street in Oakland. During the pursuit,

the suspect, later identified as Demetrius Phillips, left the vehicle and ran away. Police officers, including Officer Wilkins, continued the chase on foot. Several transmissions regarding the theft and subsequent chase were broadcast on the main police radio channel. Appellants Scarrott and Koponen heard these transmissions, and although they were already responding to another incident, they decided to assist in the search for the car theft suspect. The dispatcher directed them to 91st Avenue and B Street, where they were to help form a perimeter of police units, sealing off the area in which the suspect was believed to be located. Upon arriving at the intersection of 91st and B, Scarrott (who was driving the patrol car) saw two men near the sidewalk on B Street between 90th and 91st Avenues. He drove toward the men, and stopped the car at an angle pointing directly to the location of the two men on the sidewalk. When the car stopped, both defendants alighted to investigate. Scarrott and Koponen had each been on the street as a patrol officer for fewer than five months, and neither was acquainted with Officer Wilkins. These are the main undisputed facts.

Accepting the Wilkinses' version of the disputed facts, the following picture emerges. Although conflicting descriptions of the suspect were broadcast on the main channel, at least two of them included the detail that he was wearing a red shirt. Scarrott noticed that one of the two men on the sidewalk was wearing a red shirt; this man was in fact Demetrius Phillips, the suspect. The other man, Officer Wilkins, was wearing a gray sweatshirt. In a voice loud enough to be audible from the corner of 90th and B, Wilkins ordered Phillips to lie on the ground. After this order was repeated, Officer Wilkins punched and kicked Phillips, who

then lay spreadeagled on the ground with his head turned to the right. Wilkins pointed his gun at Phillips, and approached him from the left side. Both Mr. Phillips' position and the manner of Wilkins' approach were described by other officers at the scene as consistent with police procedure for high risk arrests, and at least one of those officers—Officer Nash—immediately recognized that the scene he was viewing was a police arrest.

At this point, Koponen said "He's got a gun." Officer Nash, after noting that the suspect was not armed, said either "He's a cop," or "That's Will," speaking to the defendants and referring to Officer Wilkins. This statement was made from less than 30 feet away from Wilkins' position. Officer Wilkins pulled off the hood of his sweatshirt, turned toward the defendants, and said loudly "It's me, Willie." He then turned back to Phillips. Koponen was less than 15 feet away. In the Appellees' version of the incident, Koponen said only "he's got a gun"; Scarrott said nothing, and neither officer ordered Wilkins to drop the gun. The Wilkinses contend that no other warning was given.

Soon after Wilkins' statement, Scarrott and Koponen opened fire. The gunshots began seconds after the officers approached Wilkins and Phillips on the sidewalk. Both officers fired several shots in the space of a few seconds: Scarrott fired six or seven times, while Koponen fired seven shots. Wilkins was hit nine times, and came to rest on the ground approximately 12 to 15 feet away from Phillips. Wilkins' gun was found on the ground next to Phillips, an indication that he had dropped his weapon at or close to his original position when Scarrott and Koponen opened fire.

Appendix A

Appellees—Officer Wilkins' estate, his widow and son, and his parents—commenced this action, alleging violations of Wilkins' constitutional rights under the Fourth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments, as well as their own substantive due process rights. The complaint requests damages under 42 U.S.C. § 1983. After discovery had begun, all the named defendants brought a motion for summary judgment, arguing *inter alia* that they were entitled to summary judgment on the substantive due process claims, that the officers did not violate Wilkins' Fourth Amendment right to be free from excessive force, and that the officers were entitled to qualified immunity.

The district court granted the motion with regard to the substantive due process claims, but denied the motion in all other respects. The portion of the district court's order denying defendants' remaining claims held first that "triable issues of material fact existed which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's Fourth Amendment right to be free from unreasonable seizure;" second, it found that "such right was clearly established at the time of the incident and, viewing the disputed material facts in the light most favorable to the plaintiffs, it would have been clear to a reasonable officer that the conduct was unlawful in the situation confronted." Scarrott and Koponen filed a timely notice of appeal.

Appendix A

DISCUSSION

We review de novo Scarrott and Koponen's appeal from a denial of summary judgment based on qualified immunity. *See Bingham*, 341 F.3d at 945. The threshold inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002). This general evaluation of the constitutionality of the alleged conduct, however, is not sufficient; we must also determine whether the actions alleged violate a clearly established constitutional right, where 'clearly established' means that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier*, 533 U.S. at 202 (emphasis added).

Graham v. Connor, 490 U.S. 386, 388 (1989), established that the use of force is contrary to the Fourth Amendment's prohibition against unreasonable seizures, if that force is excessive as measured by objective standards of reasonableness. In *Saucier*, the Supreme Court explained that this rule is applied in the first stage of the qualified immunity analysis by inquiring whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted. 533 U.S. at 205 (explaining that this rule would protect a reasonable belief that the force was required, even if that belief were mistaken). That is, the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard.

See Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997) (explaining that "it is the need for force that is at the heart of the *Graham* factors").

The second step of the analysis, which the court reaches only if it determines that the alleged conduct violates a clearly-established constitutional right, is to inquire whether the officer was reasonable in his belief that his conduct did not violate the Constitution. This step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions. *Saucier*, 533 U.S. at 206. Even if his actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity. Qualified immunity thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to decide this case.

At the time of the shooting, and unlike the other police officers at the scene, the officers were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun. Thus this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable.

It is undisputed—and the officers do not contest—that the Fourth Amendment bars the use of deadly force against a

fellow police officer effecting an arrest, and that there could be no reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998), we held that "it was clearly established that police officers retain their Fourth Amendment rights," 145 F.3d at 1085, and obvious from common sense that the decedent police officer in that case "had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work." *Id.* at 1086.

But it is equally uncontested that the officers did not believe that they were shooting a police officer. The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances. Scarrott and Koponen could not have been reasonably mistaken as to the legality of their actions had they realized that Wilkins was a police officer. As a result, the officers' entitlement to summary judgment is determined solely by the application of the first stage of the qualified immunity analysis.

The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to Officer Wilkins' status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury. We emphasize that our decision here does not affirm a reflexive denial of summary judgment whenever a material issue of fact remains to be resolved, a practice which the Supreme Court rejected in *Saucier*. Even applying the step-by-step qualified immunity analysis outlined in *Saucier*, there is no question whether the officers' actions in this case violated clearly established

law. They did. The only question for resolution is whether their belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer? Because the answer to that question depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury. *See Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002) (finding it premature to decide the qualified immunity issue "because whether the officers may be said to have made a 'reasonable mistake' of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom") (internal citation omitted). *See also Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) (acknowledging that "the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue," noting that the prohibition is consistent with the *Saucier* analytical framework, and citing cases from all other circuits to support the notion of a "general prohibition against deciding qualified immunity questions in the face of disputed historical facts").

This case presents a complicated factual situation, in which the issues that are likely to prove dispositive are hotly disputed. If resolved in favor of the Wilkinses, these issues of material fact would support a finding that Scarrott and Koponen violated Wilkins' clearly established Fourth Amendment right to be free from unreasonable seizure by excessive force. Where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate. *See Saucier*, 533 U.S. at 216

(Ginsburg, J., concurring) ("Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official."). We affirm the district court's denial of summary judgment.

AFFIRMED.

APPENDIX B — ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED AND FILED DECEMBER 17, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-1402 MMC

KELY WILKINS, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Docket No. 27)

Before the Court is the motion of defendants City of Oakland, Tim Scarrott, and Andrew Koponen for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion came on regularly for hearing on December 13, 2002. Michael J. Haddad of Haddad & Sherwin and Brian T. Dunn of Cochran, Cherry, Givens, Smith & Stewart appeared for plaintiffs. Todd Boley of Erickson, Beasley, Hewitt & Wilson appeared for defendants.

Appendix B

For the reasons stated on the record at the hearing, the Court rules as follows:

1. To the extent defendants seek judgment on plaintiffs claim that defendants violated plaintiffs' substantive due process rights, defendants' motion is hereby GRANTED.

2. In all other respects, the motion is hereby DENIED. Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:

a. Triable issues of material fact exist which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.

b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

This order terminates Docket No. 27.

IT IS SO ORDERED.

Dated: DEC 17 2002

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 14, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15086

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins; FERNANDO WILKINS, Individually; JOSEFINA WILKINS,, Individually,

Plaintiffs - Appellees,

v.

CITY OF OAKLAND,

Defendant,

and,

TIM SCARROT, individually, and his official capacity as a Police Officer for the City of Oakland; ANDREW KOPONEN, individually, and in his official capacity as a Police Officer for the City of Oakland,

Defendants - Appellants.

Appendix C

D.C. No. CV-01-01402-MMC
Northern District of California,
San Francisco

ORDER

Before: HUG, B. FLETCHER, and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Hug and B. Fletcher so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.